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United States River Treaties

Cover Page Footnote

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UNITED STATES RIVER TREATIES

LUDWIK A. TECLAFF*

RIVERS that cross the frontiers of sovereign states or separate two states are of common interest to the riparians and yet (in contrast to the high seas) there is very little, if any, customary international river law. This may be because rivers are closely connected with a state's territory, or perhaps because each river poses different and particular problems.¹ Freedom of navigation was sometimes claimed as a right existing in the absence of relevant treaties,² and in the case of the *River Oder* the Permanent Court of International Justice held that underlying European river law is a general principle of community of interest of riparian sovereign states from which stems equality of treatment for all riparians.³ But the most that can be deduced from the practice of states, perhaps as a beginning of customary international law, is the general duty of riparians to conclude agreements concerning the use of an international river.⁴

In contrast to the paucity of customary rules, conventional river law is extensive and has a long history. The earliest treaties date back at least to the twelfth century.⁵ The bulk of them are bilateral,⁶ but starting from the Treaty of Osnabrück of 1648⁷ the principles of fluvial law were developed at multipartite peace conferences and general settlement conferences.

The earlier treaties were concerned almost exclusively with navigation, but from the turn of the present century, growth of industry and expansion of agriculture have brought to the fore other uses of rivers. This was recognized, albeit to a limited degree, in the Treaty of Versailles.⁸

* Librarian, Fordham University School of Law.

1. Brierly, *The Law of Nations* 205 (5th ed. 1955).

2. Engelhardt, *Histoire du Droit Fluvial Conventionnel* 51 (1889).

3. *Territorial Jurisdiction of the Int'l Comm'n of the River Oder*, P.C.I.J., ser. A, No. 23, at 27 (1929), 2 *World Ct. Rep.* 609, 611 (1935).

4. See Hyde, *Notes on Rivers and Navigation in International Law*, 4 *Am. J. Int'l L.* 145, 154-55 (1910); *Legal Aspects of the Hydro-electric Development of Rivers and Lakes of Common Interest*, U.N. Doc. No. E/ECE/136 at 209-14 (1952).

5. E.g., the Treaty of 1171 between Italian cities concerning the River Po. See 1 Schwarzenberger, *International Law* 217 (3d ed. 1957).

6. See list of treaties given in Ogilvie, *International Waterways* 180-375 (1920), and in Berber, *Rivers in International Law*, ch. 4, at 52-127 (1959).

7. Oct. 24, 1648, 6 Dumont, *Corps Universel Diplomatique du Droit des Gens* 480 (1728). This treaty was part of the Peace of Westphalia of 1648.

8. Treaty of Peace, June 28, 1919; text in 3 Temperley, *A History of the Peace Conference of Paris* 99-336 (1920).

Further progress was made at the Barcelona Conference of 1921. Article 10 of the Statute on the Regime of Navigable Waterways of International Concern allowed a river to be closed to navigation even without the consent of the states concerned, if economic interests more pressing than navigation warranted such action.⁹ The elaboration of rules governing apportionment of waters for industrial and agricultural use was taken up in earnest after World War II by international associations,¹⁰ and the emerging concept of the integrated river basin stresses the interdependence of waters of neighboring states.

I. NONCONVENTIONAL INTERNATIONAL RIVER LAW IN NORTH AMERICA

The existence outside a treaty of rights of riparians to use or to prevent certain uses of water was claimed on several occasions by both the United States and its neighbors. In 1792, in negotiations with Spain, which was then in possession of the Louisiana territory, President Jefferson based the United States claim to free navigation on the Mississippi partly on the law of nature and nations. According to him, it was a universally acknowledged natural right that a navigable river should be open to all its inhabitants.¹¹ Similarly, Secretary of State Adams in 1823 and Secretary of State Clay in 1826 had recourse to the law of nature in support of the United States' right of navigation on the St. Lawrence.¹² In 1913, it was Great Britain which invoked customary international law in support of its objection to United States' diversion of water from Lake Michigan. Great Britain claimed that, apart from relevant treaty considerations, the United States had no right under the recognized principles of international law to divert from Lake Michigan an amount of water such as would impair the navigability of boundary waters.¹³ Earlier, in 1895, Mexico had complained that the volume of the Rio Grande was greatly diminished through excessive irrigation in Colorado and New Mexico, causing irreparable damage to farmers in Mexico. Mexico maintained that this was a violation of treaty stipulations and of principles of international law.¹⁴ These claims, however, were used as arguments in negotiations; they had little influence on the regime of United States rivers in general.

9. Barcelona Convention of 1921, April 20, 1921, 7 L.N.T.S. 57.

10. See, e.g., International Law Ass'n, Report of the Forty-Seventh Conference Held at Dubrovnik (1957), and subsequent reports.

11. 1 Moore, *International Law* § 130, at 624 (1906) [hereinafter cited as Moore].

12. *Id.* § 131, at 631-33.

13. Simsarian, *The Diversion of Waters Affecting the United States and Canada*, 32 *Am. J. Int'l L.* 488, 507-08 (1938).

14. 1 Moore § 132, at 653-54.

II. NEGOTIATIONS

It might seem that the conclusion of river treaties between neighboring countries should be a routine matter, but such is not the case. Negotiations between the United States and its southern and northern neighbors were as a rule protracted and tortuous, each side trying to take advantage of its geographic situation and relative power. Two factors contributed chiefly to this—jealous upholding of the prerogatives of territorial sovereignty, and the vital importance of river water to each country. But no matter how long and bitter the negotiations were, they invariably led to a more or less equitable accommodation, pointing perhaps to the existence of a principle of community of interest of the riparian states which, though vague and only on rare occasions explicitly proclaimed,¹⁵ nevertheless is more fundamental than the principle of exclusive jurisdiction of the territorial sovereign.

Sometimes a strict and narrow adherence to exclusive national jurisdiction over rivers had repercussions later, causing embarrassment elsewhere. In 1895, in a dispute with Mexico over the extensive use of Rio Grande water for irrigation by New Mexico's farmers, Attorney General Harmon advised that international law imposed no obligation on the United States not to divert waters on its territory to the detriment of other countries.¹⁶ But in 1903, in the dispute with Canada over the diversion of the Milk River waters, the Solicitor of the State Department in his opinion to the Secretary of State stressed that the question of law was embarrassing because of the United States' stand in the Mexican complaints concerning the Rio Grande.¹⁷

Rarely do all the advantages lie with one party. The above-mentioned dispute was a typical situation in which both parties had some leverage. The United States, through the Reclamation Act of 1902,¹⁸ proposed to divert the waters of the St. Mary River into the channel of the Milk River (which begins in the United States, flows through Canada, and returns to the United States) and thus use it for irrigation in northern Montana. The Canadians, who had just completed an irrigation canal on the St. Mary River in Canada, protested through the British Ambassador in Washington. At the same time the Canadian Minister of the Interior pointed out to the Privy Council that Canada could divert the waters of the Milk River and stop its flow into the United States.¹⁹ Negotiations dragged on for several years culminating in the

15. River Oder Case, *supra* note 3.

16. 21 Ops. Att'y Gen. 274 (1898).

17. See Simsarian, *supra* note 13, at 491.

18. Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified in scattered sections of 43 U.S.C.).

19. See Simsarian, *supra* note 13, at 489.

signing of the Boundary Waters Treaty of 1909²⁰ which settled the controversy.

Yet, in two instances negotiations have resulted in a one-sided settlement. By the Treaty of Guadalupe Hidalgo of February 2, 1848,²¹ the United States secured the right of free navigation on the Mexican parts of the Rio Grande and Colorado Rivers without giving Mexico in exchange the same right on its own sections of those rivers. A similar situation was created on the Columbia River by the treaty of June 15, 1846.²² By article II Great Britain obtained the right of navigation on the United States section of the Columbia without obligation to give a reciprocal right on the Canadian portion of the river.

The former instance appears the more extreme, since the right of navigation was obtained by the United States after a victorious war. In both cases, however, the inequities were perhaps less glaring than might at first appear, because the United States and Canada were upper riparians for whom access to the sea through the territory of the lower riparian is sometimes considered more important than the converse.²³ This is at variance with the opinion of the Permanent Court of International Justice in the *River Oder* case, where the court held that the rights of all riparians are equal and based on community of interest between them.²⁴

Sometimes during negotiations the country in a weaker position offered concessions in other fields, or the country in a stronger position demanded such concessions. During the peace negotiations at Ghent in 1814, Britain tried to retain access to the Mississippi, which it had secured by the treaty of 1783,²⁵ by offering to continue the privileges enjoyed by American fishermen in Canadian territorial waters under article III of the same treaty. The United States refused to yield on the Mississippi, and the question of fisheries was settled separately in 1818.²⁶

The St. Lawrence River controversy provides an example of how public opinion can influence the final outcome of negotiations. By the

20. Treaty with Great Britain, Jan. 11, 1909, 36 Stat. 2448, T.S. No. 548.

21. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922, T.S. No. 207, 1 Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements*, 1107 (1910) [hereinafter cited as Malloy].

22. Treaty with Great Britain, June 15, 1846, 9 Stat. 869, T.S. No. 120, 1 Malloy 656.

23. Opinion expressed by Secretary of State Bayard in 1885, quoted in 1 Moore § 131, at 639.

24. *River Oder Case*, supra note 3.

25. Definitive Treaty of Peace with Great Britain, Sept. 3, 1783, 8 Stat. 80, T.S. No. 104, 1 Malloy 586.

26. See 1 Moore § 130, at 625-26.

Exchange of Notes Between the United States and Canada of June 30, 1952,²⁷ it was agreed that the latter alone would do all the work necessary to maintain a twenty-seven foot navigation channel between Lake Erie and Montreal. The idea of an all-Canadian seaway alarmed public opinion in the United States and, due partly to that pressure, Congress provided for the establishment of the St. Lawrence Seaway Development Corporation to construct the necessary navigation works in the United States.²⁸ These parallel projects led to the Exchange of Notes Between the United States and Canada of August 17, 1954,²⁹ which divided navigation construction between the two countries.

III. GENERAL CHARACTERISTICS OF THE UNITED STATES TREATIES

Agreements concerning United States rivers are all bilateral and secure free navigation and other rights solely for the contracting parties, whereas those concerning rivers elsewhere are both multilateral and bilateral,³⁰ and in some cases proclaim freedom for all flags. Most of them are treaties, requiring the advice and consent of the Senate, but sometimes executive agreements have been used, as in the case of the St. Lawrence Seaway. Provisions pertaining to United States rivers were included in two peace treaties.³¹ On other occasions they were inserted in boundary conventions;³² in amity, commerce, and navigation treaties; in a reciprocity treaty;³³ and in a claims convention.³⁴ One treaty³⁵ was ended by denunciation by the United States, and the provisions of another³⁶ seem to have been terminated by war.

The earlier treaties pertained mainly to navigation, but the more recent ones, concluded after the turn of the century, have been increasingly

27. [1954] 2 U.S.T. & O.I.A. 1788, T.I.A.S. No. 3053.

28. 68 Stat. 92 (1954).

29. [1954] 2 U.S.T. & O.I.A. 1785, T.I.A.S. No. 3053.

30. The Treaty of Peace with Bulgaria, Feb. 10, 1947, 61 Stat. 1915, T.I.A.S. No. 1650, 41 U.N.T.S. 50, is multilateral, and has provisions concerning the Danube. The Treaty with the Argentine Confederation, July 10, 1853, 10 Stat. 1001, T.S. No. 3, 1 Malloy 18, concerning the Paraná and Uruguay Rivers, is an example of a bilateral treaty.

31. Definitive Treaty of Peace with Great Britain, Sept. 3, 1783, 8 Stat. 80, T.S. No. 104, 1 Malloy 586; and Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922, T.S. No. 207, 1 Malloy 1107.

32. E.g., Treaty with Great Britain, Aug. 9, 1842, 8 Stat. 572, T.S. No. 119, 1 Malloy 650; Treaty with Great Britain, June 15, 1846, 9 Stat. 869, T.S. No. 120, 1 Malloy 656; Treaty with Mexico, Dec. 30, 1853, 10 Stat. 1031, T.S. No. 203, 1 Malloy 1121.

33. Treaty with Great Britain, June 5, 1854, 10 Stat. 1039, T.S. No. 124, 1 Malloy 668.

34. Treaty with Great Britain, May 8, 1871, 17 Stat. 863, T.S. No. 133, 1 Malloy 700.

35. Treaty with Great Britain, June 5, 1854, 10 Stat. 1039, T.S. No. 124, 1 Malloy 668.

36. Treaty of Amity, Commerce and Navigation with Great Britain, Nov. 19, 1794, 8 Stat. 116, T.S. No. 105, 1 Malloy 590 [hereinafter cited as the Jay Treaty].

concerned with diversion of water and its utilization for hydroelectric power. Hence, the treaties with Mexico of May 21, 1906,³⁷ and of November 14, 1944,³⁸ deal exclusively with the allocation of Rio Grande and Colorado waters for irrigation; and the treaty of January 17, 1961, with Canada deals with diversion of water and power generation on the Columbia River.³⁹

A. Navigation on North American Rivers

The Mississippi.—The first river to be dealt with conventionally in North America was the Mississippi. The peace treaty of Paris of 1763 terminating the Seven Years' War between Great Britain and France provided for free navigation on the Mississippi for the citizens of both countries.⁴⁰ This freedom of navigation for the riparians was repeated in Article VIII of the Definitive Treaty of Peace with Great Britain of September 3, 1783.⁴¹ Since Great Britain had ceased in that same year to be a lower riparian of the Mississippi by ceding East and West Florida to Spain, article VIII was inserted under the impression that the northern frontier between the two countries would intersect the Mississippi.⁴²

This was taken into consideration ten years later in the Jay Treaty,⁴³ which included a provision to the effect that if a joint survey proved that the boundary between the two countries did not intersect the Mississippi,

the two parties will thereupon proceed by amicable negotiation, to regulate the boundary line in that quarter, as well as all other points to be adjusted between the said parties, according to justice and mutual convenience, and in conformity to the intent of the said treaty.⁴⁴

In contrast to the 1763 and 1783 treaties, whose provisions as to rivers were limited to the Mississippi, the Jay Treaty dealt with all waterways in the territories of both parties on the continent of North America. Subjects of Great Britain and citizens of America were allowed to pass and repass into the territories of either party on that continent

37. Convention with Mexico, May 21, 1906, 34 Stat. 2953, T.S. No. 455, 1 Malloy 1202.

38. Treaty with Mexico, Feb. 3, 1944, 59 Stat. 1219, T.S. No. 994.

39. Treaty with Canada Relating to the Columbia River Basin, Jan. 17, 1961, 44 Dep't State Bull. 234 (1961).

40. *Traité de Paix Entre la France, l'Espagne et la Grande Bretagne*, Feb. 10, 1763, 15 *Recueil des Traités de la France* 70.

41. 8 Stat. 83, T.S. No. 104, 1 Malloy 589.

42. See Definitive Treaty of Peace with Great Britain, Sept. 3, 1783, art. II, 8 Stat. 81, T.S. No. 104, 1 Malloy 587.

43. 8 Stat. 116, T.S. No. 105, 1 Malloy 590.

44. Art. IV, 8 Stat. 118, T.S. No. 105, 1 Malloy 593.

by land or by inland navigation and to navigate all the lakes, rivers and waters thereof. This freedom of navigation pertained to inland waterways and did not extend

to the admission of vessels of the United States into the sea-ports, harbours, bays, or creeks of his Majesty's said territories; nor into such parts of the rivers in his Majesty's said territories as are between the mouth thereof, and the highest port of entry from the sea . . . nor to the admission of British vessels from the sea into the rivers of the United States, beyond the highest ports of entry for foreign vessels from the sea.⁴⁵

These provisions seem to have been comprehensive enough to have given Great Britain claim to navigation on the Mississippi, if it could be reached by a tributary originating in Canada. But, according to British practice at that time, the treaties of 1783 and 1794 were considered ended by the War of 1812⁴⁶ and so, during the peace negotiations at Ghent, the British tried to retain navigation on the Mississippi, not as a treaty right, but as consideration for the continuance of American fishermen's privileges. The American negotiators refused to yield and freedom of navigation on the Mississippi was not included in the Treaty of Ghent.⁴⁷

Even if there had been no War of 1812, it is doubtful whether the United States Government would have consented to a continuance of the British right of navigation on the Mississippi once it was established that the frontier did not cross that river. Article IV of the Jay Treaty stipulated that if the frontier did not intersect the river, the two parties should settle by amicable negotiation the boundary question and all other points in conformity with the intent of the peace treaty of 1783.⁴⁸ Since the principle of free navigation on inland waterways for non-riparians was introduced for the first time by the Treaty of Paris of 1814⁴⁹ it would be difficult to impute such intent to a treaty concluded in 1783 without explicit provision to that effect.

But Article XIV of the Jay Treaty established freedom of commerce and navigation between the European territories of England and the United States. It permitted the inhabitants of the two countries to come with their ships and cargoes to each other's lands, countries, cities, ports, places and rivers. Since this privilege was not explicitly restricted

45. Art. III, 8 Stat. 117, T.S. No. 105, 1 Malloy 592.

46. See 1 Malloy 580 note a.

47. Treaty of Peace and Amity with Great Britain, Dec. 24, 1814, 8 Stat. 218, T.S. No. 109, 1 Malloy 612.

48. 8 Stat. 118, T.S. No. 105, 1 Malloy 593.

49. *Traité de Paix Entre la France et l'Autriche*, May 30, 1814, art. V, 2 Martens, *Nouveau Recueil des Traités* 6 (1818).

to places, rivers, and so forth, open to foreign commerce, it might be inferred that British vessels could sail up United States rivers, including the Mississippi, as far as was practicable. Thus article XIV would grant to British ships rights which article III was supposed to curtail and article IV might curtail. However, article XIV was merely a temporary provision. According to article XXVIII, only the first ten articles were to be permanent and all the rest, except article XII, were to expire after twelve years.

Simultaneously, the United States was engaged in protracted negotiations with Spain, which replaced Great Britain in 1783 as the lower riparian on the Mississippi. Finally, on October 27, 1795, the Treaty of Friendship, Limits and Navigation was concluded.⁵⁰ Article IV stated:

And his Catholic Majesty has likewise agreed that the navigation of the said river, in its whole breadth from its source to the ocean, shall be free only to his subjects and the citizens of the United States, unless he should extend this privilege to the subjects of other powers by special convention.⁵¹

This sounds more like granting a privilege than acknowledging a right, as sought by the United States negotiators. However, since it was doubtful whether the Spaniards would have agreed otherwise to a treaty, the United States negotiators acquiesced.

The situation soon changed entirely, due to complications in Europe. Spain was forced by the secret Treaty of San Ildefonso of October 1, 1800⁵² to return the Louisiana Territory to France, and Napoleon I, after a short-lived dream of creating an empire in America, sold it to the United States.⁵³ Spain followed suit, and by the treaty of February 22, 1891, ceded "all the territories . . . situated to the eastward of the Mississippi, known by the name of East and West Florida."⁵⁴ This treaty specifically stated that article IV (concerning the Mississippi) of the 1795 convention had lost its validity. Thus ended the question of freedom of navigation on the Mississippi, but that of navigation on other rivers had only begun.

Attempts at a General Settlement.—Article III of the Jay Treaty dealt comprehensively with Canadian and United States rivers, but after its extinction in the War of 1812, such general settlement was never achieved.

50. Treaty of Friendship, Limits and Navigation with Spain, Oct. 27, 1795, 8 Stat. 138, T.S. No. 325, 2 Malloy 1640.

51. 8 Stat. 140, T.S. No. 325, 1 Malloy 1642.

52. 1 Recueil des Traités de la France 411.

53. Treaty with the French Republic, April 30, 1803, 8 Stat. 200, T.S. No. 86, 1 Malloy 508.

54. Treaty of Amity, Settlement, and Limits with Spain, Feb. 22, 1819, art. II, 8 Stat. 254, T.S. No. 327, 2 Malloy 1652.

The Convention with Great Britain of October 20, 1818,⁵⁵ respecting fisheries, boundaries, and the restoration of slaves approached in comprehensiveness the Jay Treaty, but for a part of the country only. Article 3 provided that:

[A]ny country that may be claimed by either party on the northwest coast of America, westward of the Stony Mountains, shall, together with its harbours, bays, and creeks, and the navigation of all rivers within the same, be free and open, for the term of ten years from the date of the signature of the present convention, to the vessels, citizens, and subjects, of the two powers. . . .⁵⁶

The duration of this article was further extended by the Convention with Great Britain of August 6, 1827.⁵⁷ But the treaty of 1846 (establishing the boundary between the two countries west of the Rocky Mountains)⁵⁸ did not incorporate it.

On the whole, after the Treaty of Ghent, the settlement of river problems became piecemeal and the right of navigation was frequently disputed, especially on rivers or sections of rivers flowing from one country into another. The right of navigation on rivers and lakes actually forming frontiers was less troublesome.

United States-Canadian Boundary Waters.—It is generally accepted that, in the absence of exclusive title to the whole river, navigation on boundary streams is open to both riparians.⁵⁹ As a rule, however, the riparians conclude treaties which define freedom of navigation on their frontier waters. Thus the Webster-Ashburton Treaty of 1842 stated that sections of the St. Lawrence River⁶⁰ and of the St. John River⁶¹ forming the frontier were open to both parties. But it was not until 1909 that a general convention concerning boundary waters was concluded, confirming freedom of navigation for both parties on all boundary waters.⁶²

Other United States-Canadian Waters.—There is no general treaty concerning the freedom of navigation on transboundary waters. The problem is dealt with piecemeal. Article III of the Webster-Ashburton Treaty provided that the agricultural and forestry produce of those parts of the State of Maine watered by the St. John River and its tributaries should have freedom of transportation to and from the sea through

55. 8 Stat. 248, T.S. No. 112, 1 Malloy 631.

56. 8 Stat. 249, T.S. No. 112, 1 Malloy 632.

57. 8 Stat. 360, T.S. No. 116, 1 Malloy 643.

58. Treaty with Great Britain, June 15, 1846, 9 Stat. 869, T.S. No. 120, 1 Malloy 656.

59. See 1 Moore § 128, at 616-17.

60. Treaty with Great Britain, Aug. 9, 1842, art. VII, 8 Stat. 575, T.S. No. 119, 1 Malloy 654.

61. Treaty with Great Britain, Aug. 9, 1842, art. III, 8 Stat. 574, T.S. No. 119, 1 Malloy 653.

62. Treaty with Great Britain, Jan. 11, 1909, 36 Stat. 2448, T.S. No. 548.

the lower section of the river in Canada. Similarly, the produce of the territory of the upper St. John, determined by the treaty as belonging to Great Britain, was granted right of passage through the section of the river flowing in Maine.

The 1846 treaty⁶³ concerning boundaries in the West opened the section of the Columbia River lying in United States territory to the Hudson's Bay Company and to all British subjects trading with it. The reciprocal right of navigation for United States citizens on the British part of the Columbia River was not granted. Both treaties upheld the preferential situation of the upper riparians and in this respect retrogressed from the position accepted in the treaty of 1818,⁶⁴ by which rivers beyond the Rocky Mountains were opened to both sides regardless of geographic situation. However, in the negotiations concerning navigation on the St. Lawrence River, Great Britain refused to acknowledge the privileged position of the upper riparians⁶⁵ and eventually granted the United States the right to navigate the lower St. Lawrence as a concession in exchange for the right of British subjects to navigate Lake Michigan and state canals.⁶⁶ The treaty was concluded for ten years, with the proviso that after this period either party could denounce it on twelve months' notice. It was so denounced in 1866 by the United States.

The equal rights of lower riparians were fully recognized in the treaty of 1871⁶⁷ which was concluded mainly for the settlement of the so-called Alabama claims arising out of the building and outfitting in British ports of the Confederate vessel *Alabama* and other ships. Article XXVI stipulated freedom of navigation for both parties to and from the sea on the Alaskan rivers Yukon, Porcupine and Stikine.⁶⁸ Thus the United States, a lower riparian, secured the right to navigate through the upper sections of those rivers in British territory.

The same article settled the United States' right to navigate the St. Lawrence, and article XXVIII re-established for ten years freedom of

63. Treaty with Great Britain, June 15, 1846, art. II, 9 Stat. 869, T.S. No. 120, 1 Malloy 657.

64. Convention with Great Britain, Oct. 20, 1818, 8 Stat. 248, T.S. No. 112, 1 Malloy 631.

65. See 1 Moore § 131, at 632.

66. Treaty with Great Britain, June 5, 1854, 10 Stat. 1089, T.S. No. 124, 1 Malloy 668. As far as state canals were concerned, the United States undertook only to urge the states to grant freedom of navigation to British subjects on those canals. Art. 4, 10 Stat. 1091, T.S. No. 124, 1 Malloy 671.

67. Treaty with Great Britain, May 8, 1871, 17 Stat. 863, T.S. No. 133, 1 Malloy 700.

68. 17 Stat. 872, T.S. No. 133, 1 Malloy 711.

navigation on Lake Michigan,⁶⁹ which Great Britain had lost when the 1854 treaty was denounced. This question was more firmly settled by the treaty of 1909,⁷⁰ which also confirmed freedom of navigation for both parties on canals connecting boundary waters but lying on either side of the line. However, this right ends with the termination of the treaty, in contrast to the navigation of the boundary waters themselves which remains permanently free.

United States-Mexican Rivers.—Once the question of the Mississippi was settled, no river agreements were concluded in the South until the Treaty of Guadalupe Hidalgo of 1848⁷¹ by which the United States acquired major parts of the Colorado and Rio Grande Rivers.

Article VI of that treaty secured for the United States "free and uninterrupted passage by the Gulf of California, and by the River Colorado below its confluence with the Gila, to and from their possessions situated north of the boundary line"⁷² and article VII did the same in respect to the Gila River and the part of the Rio Grande (Rio Bravo) lying in Mexico.⁷³

By these provisions the United States, the upper riparian, obtained the right of navigation through the territories of Mexico, the lower riparian, without granting reciprocal rights in its territory. There were several reasons for this unequal treatment: (a) United States rights were secured as the consequence of a victorious war; (b) both rivers are much less navigable above the frontier; and (c) even in the North, where the bargaining strengths of the United States and Great Britain were more equal, the rights of the lower riparian were not always acknowledged. When the Mesilla Valley was ceded to the United States by the treaty of 1853,⁷⁴ article IV of that treaty confirmed navigation rights of the United States below the new frontier.⁷⁵

B. *Changes in the River Bed*

The Rio Grande became the subject of several conventions with Mexico because of changes in its bed caused by accretion, erosion, and avulsion. The boundary convention of 1884 stipulated that the frontier between the two countries should follow the center of the normal channel of

69. *Ibid.*

70. Treaty with Great Britain, Jan. 11, 1909, art. I, 36 Stat. 2449, T.S. No. 548.

71. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922, T.S. No. 207, 1 Malloy 1107.

72. 9 Stat. 928, T.S. No. 207, 1 Malloy 1111.

73. *Ibid.*

74. Treaty with Mexico, Dec. 30, 1853, 10 Stat. 1031, T.S. No. 203, 1 Malloy 1121.

75. 10 Stat. 1034, T.S. No. 203, 1 Malloy 1123.

the Rio Grande and the Colorado, notwithstanding any changes in the bed of those rivers, provided that the changes were effected "by natural causes through the slow and gradual erosion and deposit of alluvium."⁷⁶ If changes were wrought in any other manner, then the frontier was to follow the old channel.⁷⁷

The convention of 1889⁷⁸ re-established the International Boundary Commission first created by the convention of 1882.⁷⁹ It was given exclusive jurisdiction to pass on questions connected with changes in the bed of the Rio Grande and the Colorado along the frontier. The Commission's original five-year term of office was prolonged several times until it was extended indefinitely by the Water Boundary Convention of 1900,⁸⁰ subject however, to the right of either party to terminate the Commission upon six months' notice.

In changing its bed the Rio Grande frequently left small pieces of land, or *bancos*, separated by the new bed from the land of which they had previously formed a part. According to the 1884 convention, the *bancos* remained under the jurisdiction of the country from which they were detached.⁸¹ In many cases, however, the old channel of the river became effaced and the Boundary Commission's survey showed that it was then difficult to decide to whom the *bancos* should belong. In March 1905, a convention was therefore signed, according to which the surveyed *bancos* on the right bank should pass to Mexico and those on the left bank to the United States.⁸² This principle was to be used also in future delimitations.⁸³ Pieces of land of over 200 hectares in size or with populations of over 250 persons were excepted,⁸⁴ and so article II of the 1884 convention still applied to them. The principles of the Banco Elimination Convention of 1905 were used by the 1933 Convention with Mexico for the Rectification of the Rio Grande⁸⁵ for the lands remaining on either side of the straightened river channel.

76. Convention with Mexico, Nov. 12, 1884, art. I, 24 Stat. 1012, T.S. No. 226, 1 Malloy 1160.

77. Art. II, 24 Stat. 1012, T.S. No. 226, 1 Malloy 1160.

78. Convention with Mexico, March 1, 1889, 26 Stat. 1512, T.S. No. 232, 1 Malloy 1167.

79. Convention with Mexico, July 29, 1882, 22 Stat. 986, T.S. No. 220, 1 Malloy 1141.

80. Nov. 21, 1900, 31 Stat. 1936, T.S. No. 244, 1 Malloy 1192. The Treaty with Mexico, Feb. 23, 1944, substitutes International Boundary and Water Commission, United States and Mexico, for International Boundary Commission. Art. II, 59 Stat. 1222, T.S. No. 994.

81. Convention with Mexico, Nov. 12, 1884, art. II, 24 Stat. 1012, T.S. No. 226, 1 Malloy 1160.

82. Convention with Mexico, March 20, 1905, art. I, 35 Stat. 1865, T.S. No. 461, 1 Malloy 1200.

83. Art. II, 35 Stat. 1866, T.S. No. 461, 1 Malloy 1200.

84. Ibid.

85. Feb. 1, 1933, 48 Stat. 1621, T.S. No. 864.

C. Uses of Water Other Than For Navigation

The problem of diversion looms large in agricultural and industrial uses of water which require the building of permanent structures on the water.⁸⁶ Earlier agreements forbade the erection of any obstruction that might impede navigation. One such agreement was the Webster-Ashburton Treaty which provided that where the St. John River formed a boundary, "the navigation of the said river shall be free and open to both parties, and shall in no way be obstructed by either. . . ."⁸⁷ Six years later, the Treaty of Guadalupe Hidalgo forbade either party to construct any work that might impede or interrupt the navigation of the Gila and of the Bravo Rivers below the Mexican boundary, not even for the purpose of favoring new methods of navigation.⁸⁸

1. Treaties With Mexico

Article VII of the Treaty of Guadalupe Hidalgo was relied upon, together with principles of general international law, in the Mexican complaint lodged on October 21, 1895, against United States diversion of the waters of the Rio Grande.⁸⁹ The dispute led to the famous opinion of Attorney General Harmon, asserting the United States' right to divert any waters inside its frontiers in the absence of treaty obligations.⁹⁰

The United States and Mexico instructed the International Boundary Commission to investigate the problem. The Commission's report of November 25, 1896, advised the conclusion of a treaty which would divide the Rio Grande waters between the two countries.⁹¹ Ten years later, on May 21, 1906, a convention was concluded,⁹² the first United States treaty entirely devoted to water problems. It stipulated that the United States would deliver to Mexico 60,000 acre-feet of water annually from Elephant Butte Dam⁹³ free of cost.⁹⁴ The United States made it clear, however, that the Harmon doctrine had not been abandoned: "The delivery of water as herein provided is not to be construed as a

86. Diversion for agricultural purposes is permanent; water diverted for industrial purposes is usually returned to the channel, but often changed in quality.

87. Treaty with Great Britain, Aug. 9, 1842, art. III, 8 Stat. 574, T.S. No. 119, 1 Malloy 653.

88. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, art. VII, 9 Stat. 928, T.S. No. 207, 1 Malloy 1111.

89. See 1 Moore § 132, at 653-54.

90. 21 Ops. Att'y Gen. 274 (1898).

91. See Griffin, *The Use of Waters of International Drainage Basins Under Customary International Law*, 53 Am. J. Int'l L. 50, 51 (1959).

92. Convention with Mexico, May 21, 1906, 34 Stat. 2953, T.S. No. 455, 1 Malloy 1202.

93. Art. I, 34 Stat. 2953, T.S. No. 455, 1 Malloy 1202.

94. Art. III, 34 Stat. 2954, T.S. No. 455, 1 Malloy 1203.

recognition by the United States of any claim on the part of Mexico to the said waters."⁹⁵

Background of the 1944 Treaty.—The treaty of 1906 was only a partial and temporary solution to the water problems of the two countries: (a) because it legalized the stronger bargaining position of the United States as the upper riparian; and (b) because it was limited solely to the Rio Grande, leaving the Colorado River without any conventional arrangement. The necessity for a more comprehensive agreement became apparent as early as 1908. Two joint commissions, one for the Rio Grande and the other for the Colorado, were appointed to study the problem of equitable distribution of waters, but due to political complications in Mexico no further negotiations took place until 1925.⁹⁶

In 1927 a new commission, the International Water Commission, United States and Mexico, was appointed. The two sections could not agree on a joint communication and in 1930 the United States section alone submitted a report, summarizing the Mexican and United States positions.⁹⁷ Mexico maintained that the 1906 agreement was unjust and demanded a more advantageous distribution of the waters in return for the modification of treaties prohibiting any impairment to the navigation of the Colorado and the Rio Grande. The United States section urged that, owing to the importance of those rivers for irrigation, priority of navigation should be abandoned, and pointed out that the 1906 agreement had provided for equitable distribution of Rio Grande water as an act of comity. It recommended, however, that from similar motives of comity the United States should deliver annually to Mexico 750,000 acre-feet of Colorado River water, *but no more* than that amount, because approval of the 3,600,000 acre-feet demanded by Mexico would mean curtailing the development of United States land for the advantage of Mexican land that was not then, and might never be, irrigated.

With that report the matter rested for five years until further study was authorized by Congress in 1935. The American section of the International Water Commission was abolished and its functions transferred to the International Boundary Commission, to which the task of exploring the ground for agreement was entrusted.⁹⁸

The 1944 Treaty.—This time the negotiations were successful and in 1944 a new treaty was signed.⁹⁹ It is a compromise between the Mexican and United States positions and seems to embody a genuinely equitable distribution of waters between the two countries.

95. Art. IV, 34 Stat. 2955, T.S. No. 455, 1 Malloy 1203.

96. See 1 Hackworth, *International Law* 585 (1940).

97. *Id.* at 587.

98. *Id.* at 589.

99. Treaty with Mexico, Feb. 3, 1944, 59 Stat. 1219, T.S. No. 994.

The treaty puts domestic and municipal uses of water at the top of a new scale of priorities, followed by agricultural, power, and other industrial uses, in that order. Navigation comes a modest fifth above fishing.¹⁰⁰ The notion that Mexico is granted the use of water through comity is completely discarded and each country's ownership of the water allotted is recognized.¹⁰¹ Both governments agreed to construct dams and reservoirs, jointly on the Rio Grande¹⁰² and separately on the Colorado.¹⁰³ On the whole each government is to cover the cost of works in proportion to benefits received.

The treaty is flexible in permitting waters allotted to one country to be diverted to the use of the other. According to article 8(c):

In any reservoir the ownership of water belonging to the country whose conservation capacity therein is filled, and in excess of that needed to keep it filled, shall pass to the other country to the extent that such country may have unfilled conservation capacity. . . .¹⁰⁴

Furthermore, either party has the right to divert from the main channel of the Rio Grande any amount of water for the purpose of generating hydroelectric power, including water belonging to the other country, provided that: (a) such diversion causes no injury and does not interfere with the international generation of power; and (b) that the quantities not returned directly to the river are charged to the share of the country making such diversion.¹⁰⁵

The treaty is implemented through the services of the International Boundary and Water Commission, United States and Mexico, formerly the International Boundary Commission of 1889.¹⁰⁶ The Commission is charged generally with planning works provided for in agreements between the two countries and connected with boundary and international waters.¹⁰⁷ It is also charged specifically with planning works enumerated in the treaty¹⁰⁸ and works concerned with flood control¹⁰⁹ and generation of electric power.¹¹⁰

The Commission has power to authorize either country temporarily to divert waters not belonging to it¹¹¹ and is entrusted with the task of

100. Art. 3, 59 Stat. 1225, T.S. No. 994.

101. Art. 8, 59 Stat. 1231, T.S. No. 994.

102. Art. 5, 59 Stat. 1228, T.S. No. 994.

103. Art. 12, 59 Stat. 1239, T.S. No. 994.

104. 59 Stat. 1232, T.S. No. 994.

105. Art. 9, 59 Stat. 1234, T.S. No. 994.

106. Art. 20, 59 Stat. 1251, T.S. No. 994.

107. Art. 24, 59 Stat. 1255, T.S. No. 944.

108. Art. 5, 59 Stat. 1228, T.S. No. 994.

109. Arts. 6, 13, 59 Stat. 1230, 1241, T.S. No. 994.

110. Art. 7, 59 Stat. 1231, T.S. No. 994.

111. Art. 9, 59 Stat. 1234, T.S. No. 994.

settling differences that may arise with respect to the interpretation or application of the treaty, subject to the approval of both parties. The two national sections of the Commission are entrusted with, and retain jurisdiction over, approved work located within the limits of their respective countries and neither can assume control over work located in the other country without the express consent of the latter's government. The Commission's powers can be characterized as investigative, administrative and arbitral. However, it has no right to approve certain works in the manner of the International Joint Commission.

Decisions of the Commission are recorded in the form of minutes and, except where the specific approval of both parties is required by any provisions of the treaty, if one of the governments fails to communicate its disapproval to the Commission within thirty days, the decision is considered approved.¹¹²

On November 14, 1944, both parties signed a protocol which defined the Commission's jurisdiction as extending to all works along the boundary line and to those constructed exclusively for the discharge of the treaty, whereas those constructed only partly for the performance of the treaty inside either country were to be under federal agencies. The protocol was made an integral part of the treaty.¹¹³

The United States Senate advised the ratification of the treaty on April 8, 1945, with certain understandings. Mexico approved the understandings in all that pertained to the rights and obligations of both parties, and refrained from passing on those points which related exclusively to internal applications of the treaty.

2. Treaties With Canada

At the time of the conclusion of the 1906 treaty with Mexico, negotiations with Britain, which had originated in a dispute about the diversion of Milk River waters,¹¹⁴ were drawing to an end. They resulted in the signing of the Boundary Waters Treaty of 1909, the most comprehensive settlement of river problems between the two countries since 1794.

Boundary Waters Treaty of 1909.—In its Preliminary Article the treaty defines boundary waters as

waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof. . . .¹¹⁵

112. Art. 25, 59 Stat. 1257, T.S. No. 994.

113. Protocol, 59 Stat. 1261, T.S. No. 994.

114. Simsarian, *The Diversion of Waters Affecting the United States and Canada*, 32 Am. J. Int'l L. 488, 491 (1938).

115. Treaty with Great Britain, Jan. 11, 1909, 36 Stat. 2448, T.S. No. 548.

No use, obstruction, or diversion of those waters (in addition to those already permitted or afterwards provided for by special agreement) which would affect the natural level or flow on the other side of the line can be made without the approval of the International Joint Commission.¹¹⁶

However, the definition of boundary waters does not include streams that flow across the frontier or flow into or from the waters along which the frontier runs. These are divided into two categories: (1) waters flowing into the boundary and sections of transboundary waters above the frontier, over which each country retains full jurisdiction and control;¹¹⁷ and (2) waters flowing from the boundary and sections of transboundary waters lying below the frontier, over which exclusive control is limited to the extent that permission of the International Joint Commission is required for works which would raise the natural level of waters on the other side of the boundary.¹¹⁸

The right to divert waters without the consent of the other side, as provided by article II, would be pure Harmon doctrine but for the stipulations giving the right to any person injured by interference with waters on the other side to institute legal proceedings in the courts of the country in which such interference occurred.

The treaty creates an International Joint Commission composed of six commissioners, one half nominated by each party, to whom the implementation of the treaty is entrusted.¹¹⁹ Their decisions are taken by majority vote.¹²⁰ The Commission's most important power is the right to issue binding orders on both parties in cases of diversion and obstruction defined in articles III and IV. In passing on such cases, the Commission is to be governed by certain priorities in the use of water: (1) for domestic and sanitary purposes, (2) for navigation, and (3) for power and irrigation.¹²¹ Thus, contrary to the treaty of 1944 with Mexico, navigation still precedes industrial and agricultural uses. Further, the Commission examines and reports upon questions of difference which have been referred to it involving rights, obligations or interests along the common boundary. Such a report, however, is not binding on the parties,¹²² but the two countries can refer to the Commission the same kind of question for decision, which then has the binding effect of an arbitration award.¹²³

116. Art. III, 36 Stat. 2449, T.S. No. 548.

117. Art. II, 36 Stat. 2449, T.S. No. 548.

118. Art. IV, 36 Stat. 2450, T.S. No. 548.

119. Art. VII, 36 Stat. 2451, T.S. No. 548.

120. Art. X, 36 Stat. 2453, T.S. No. 548.

121. Art. VIII, 36 Stat. 2451, T.S. No. 548.

122. Art. IX, 36 Stat. 2452, T.S. No. 548.

123. Art. X, 36 Stat. 2453, T.S. No. 548.

The Joint Commission's powers can be classified as arbitral (giving awards), judicial (certain works need its approval), investigative, and administrative. It is a more independent body than the International Boundary and Water Commission created by the 1944 treaty with Mexico.

*Power and the Building of the Seaway.*¹²⁴—Soon after its creation, the International Joint Commission began to play an important role in the development of the St. Lawrence River basin. In 1919 it was asked to study the scope of improvements necessary to open the St. Lawrence River for seagoing vessels, and reported favorably in 1921. But it took ten years of negotiations and further engineering studies before the Great Lakes-St. Lawrence Deep Waterway Treaty was signed in 1932,¹²⁵ providing for the construction of a twenty-seven foot channel from Montreal to the head of the Great Lakes together with power development. In spite of long and careful preparation, the treaty failed in 1934 to secure the requisite two-thirds majority in the Senate and was not ratified.¹²⁶ Fear of the detrimental impact of the new seaway on eastern seaboard ports, together with the opposition of land transportation interests, outweighed arguments for the advantages it would have brought.

Since it was doubtful whether a two-thirds majority in the Senate would ever be mustered, a different approach was tried in 1941. Instead of a treaty, an executive agreement requiring the approval of Congress was signed with Canada in that year.¹²⁷ It provided for joint development of the Seaway and of power facilities in the International Rapids section of the river, diversion of water from the Great Lakes system, and creation of a Great Lakes-St. Lawrence Basin Commission for the construction and maintenance of works.

The fact that an executive agreement was employed stirred a debate as to the constitutionality of the whole procedure.¹²⁸ Opponents of the project especially objected to the device of substituting congressional for senate approval. It seems that there would have been less objection if the agreement had been previously authorized by Congress, because numerous examples already existed for this procedure. But the procedure of subsequent, instead of prior, approval by Congress was not entirely

124. The building of the Seaway has been combined with power development and therefore it is discussed in the section of this article dealing with uses of water other than for navigation.

125. July 18, 1932; text in Great Lakes-St. Lawrence Deep Waterway Treaty, U.S. Dep't of State Pub. No. 347 (1932).

126. See 1 Hackworth, *op. cit. supra* note 96, at 605.

127. Text in 4 Dep't State Bull. 307-13 (1941).

128. See Borchard, *The St. Lawrence Waterway and Power Project*, 43 *Am. J. Int'l L.* 411 (1949).

new.¹²⁹ Nonetheless, the opposition prevailed and congressional approval was not forthcoming.

After World War II, a third approach was tried. This time it was decided to bypass Congress altogether. On June 30, 1952, the two countries concluded an executive agreement in the form of an exchange of notes,¹³⁰ in which they agreed to seek the approval of the International Joint Commission, in accordance with article III of the 1909 treaty, for the joint construction of power facilities. Canada alone was to build the Seaway on its side of the border.

The Commission approved the application on October 29, 1952,¹³¹ upon certain conditions: the protection and indemnity of all interests which might be injured by the projected works, priority of navigation over power, and establishment of the St. Lawrence River Joint Board of Engineers, whose function was to pass on plans and specifications of power works, and of the St. Lawrence River Board of Control as the Commission's instrument in supervising the outflow from Lake Ontario and the flow through the International Rapids section.

Since the International Joint Commission's order constituted the immediate legal basis for the projected work, its opponents concentrated on challenging the jurisdiction of the Commission. The old arguments that the matter could be dealt with only by a treaty or at the very least by an executive agreement authorized by Congress were again put forward, coupled with an interpretation of the 1909 treaty to the effect that the lack of dispute between the two governments precluded the jurisdiction of the International Joint Commission. The opposition failed, however, and the validity of the Commission's jurisdiction withstood all attacks.¹³²

As was to be expected, the plan for construction of the Seaway by Canada alone alarmed public opinion in the United States, and in 1954 Congress passed a statute establishing the St. Lawrence Seaway Development Corporation to construct navigation works on the United States side and empowering it to seek arrangements with its Canadian counterpart.¹³³ A new exchange of notes with Canada followed on August 17, 1954,¹³⁴ which co-ordinated the United States and Canadian projects. In this complicated way the legal basis for the St. Lawrence Seaway and power project were completed.¹³⁵ They comprise: United States

129. See Corwin, *The President: Office and Powers* 264 (1940).

130. [1954] 2 U.S.T. & O.I.A. 1788, T.I.A.S. No. 3053.

131. International Joint Comm'n (U.S. & Canada), Docket 68, quoted in Cohen & Nadeau, *The Legal Framework of the St. Lawrence Seaway*, 1959 U. Ill. L.F. 29, 42.

132. See Kunen, *International Negotiations Concerning the St. Lawrence Project*, 33 U. Det. L.J. 14, 19-23 (1955).

133. 68 Stat. 92 (1954).

134. [1954] 2 U.S.T. & O.I.A. 1785, T.I.A.S. No. 3053.

135. Nonriparian flags have been operating on the St. Lawrence, as a waterway leading

and Canadian national legislative acts, executive agreements of 1952 and 1954, and the order of approval of the International Joint Commission.

Power on the Niagara River.—The Boundary Waters Treaty of 1909 dealt also with the diversion of waters above Niagara Falls for power generation.¹³⁶ Following the recommendation of the International Waterways Commission,¹³⁷ it gave Canada the right to divert 36,000 cubic feet per second (c.f.s.) and the United States 20,000 c.f.s. These amounts were deemed consistent with the preservation of the scenic beauty of the falls. The unequal division stemmed partly from a desire to compensate Canada for the Chicago Sanitary District diversion from Lake Michigan. This state of affairs remained unchanged until 1940 in spite of efforts, chiefly Canadian, to increase the Niagara diversion.¹³⁸ In that year, in anticipation of the conclusion of a more comprehensive agreement concerning also the St. Lawrence River, Canada was authorized by an exchange of notes to divert waters from the Albany River basin into the Great Lakes and to increase its diversion at Niagara Falls by an equivalent amount.¹³⁹

When the later comprehensive agreement¹⁴⁰ failed to receive congressional approval, further increases of diversion above Niagara Falls, due to the demands for more power created by World War II, were authorized by two exchanges of notes, one in 1941¹⁴¹ and the other in 1948.¹⁴² The problem of diversion above Niagara Falls was finally settled by the convention of February 27, 1950.¹⁴³ Its solution differs from those adopted in previous agreements and attempted agreements. Instead of authorizing a fixed amount of diversion it specifies the flow which must be left undiminished for the preservation of the scenic beauty of the

to Great Lakes ports which were open to foreign commerce, ever since the 1930's, long before the river was made fully navigable for deep-draught oceangoing vessels. Thus the St. Lawrence became the first United States river on which flags of all nations could navigate. In practice, therefore, the problem of whether there should be freedom of navigation for all or only for the riparians reduces itself more often than not to a question of technical possibility and actual interest.

136. Treaty with Great Britain, Jan. 11, 1909, art. V, 36 Stat. 2450, T.S. No. 548.

137. See 1 Hackworth, *op. cit.* supra note 96, at 590-91.

138. The treaty of 1929 allowing increased diversion was not approved by the Senate because it would be a gift to the private power companies. See Willoughby, *The St. Lawrence Waterway* 164 (1961).

139. 3 Dep't State Bull. 430 (1940).

140. See note 127 supra and accompanying text.

141. May 20, 1941, 55 Stat. 1276, E.A.S. No. 209; Oct. 27, 1941, 55 Stat. 1380, E.A.S. No. 223.

142. Dec. 23, 1948, 20 Dep't State Bull. 85 (1949).

143. Convention with Canada Relating to Water Diversion on the Niagara River, Feb. 27, 1950, [1950] 1 U.S.T. & O.I.A. 694, T.I.A.S. No. 2130.

falls.¹⁴⁴ Water over and above that amount is to be divided equally between the two countries.¹⁴⁵

Columbia River.—The International Joint Commission played a part, though not as important as its role in the St. Lawrence Seaway arrangements, in the preparation of the Columbia River Treaty, signed on January 17, 1961.¹⁴⁶ In 1944 Canada and the United States referred to the Commission, under article IX of the treaty of 1909, the question of how to make better use of the Columbia River system. It soon became apparent that the Canadian and United States views were far apart. Although the major section of the Columbia River flows in the United States, Canadian cooperation is necessary to develop the basin to its full potential because the best dam sites are located in Canada. But as the upstream riparian, Canada is not only privileged by nature, but also by law, which in the form of article II of the treaty of 1909, gives exclusive jurisdiction to the upper riparian over its section of trans-boundary river. Therefore, plans were evolved in Canada for unilateral development of the Columbia basin or for the diversion of part of its waters into the Fraser River system. As a price for the settlement Canada demanded, in addition to the return of the costs of dams and reservoirs built on its territory, that it be allotted a share in the power generated in the United States with the aid of these facilities (the so-called downstream benefit theory).¹⁴⁷

In 1956 the Commission was still deadlocked and the matter was transferred to diplomatic levels, limiting the Commission to an advisory role. The resulting treaty incorporated the downstream benefit theory, allotting to Canada half the power generated in the United States with Canadian facilities;¹⁴⁸ this can be disposed of in the United States under conditions to be set in a future agreement.¹⁴⁹ In exchange, Canada undertook to provide 15.5 million acre-feet of storage by constructing dams near Mica Creek, near the outlet of Arrow Lake, and on one or more tributaries of the Kootenay River.¹⁵⁰ The Canadian storage will be operated both for production of electricity and for flood control.¹⁵¹ The United States undertook to pay Canada for flood control measures according to the schedule provided in article VI. On its side of the river

144. Art. IV, [1950] 1 U.S.T. & O.I.A. 697, T.I.A.S. No. 2130.

145. Art. VI, [1950] 1 U.S.T. & O.I.A. 697, T.I.A.S. No. 2130.

146. Treaty with Canada Relating to the Columbia River Basin, Jan. 17, 1961, 44 Dep't State Bull. 234 (1961).

147. For the Canadian views see Cohen & Nadeau, *supra* note 131.

148. Art. V, 44 Dep't State Bull. 235 (1961).

149. Art. VIII, 44 Dep't State Bull. 236 (1961).

150. Art. II, 44 Dep't State Bull. 234 (1961).

151. Art. IV, 44 Dep't State Bull. 235 (1961).

the United States is to operate hydroelectric facilities in the most effective manner.¹⁵² The United States retains for a period of five years the option to construct a dam on the Kootenay River near Libby, Montana, and if the option is exercised, Canada is to prepare and make available land for flooding. Here, contrary to article V, each country receives only those benefits which actually accrue on its territory.¹⁵³

Diversion of waters without the consent of the other party is prohibited, with exceptions concerning the Kootenay River and described in detail in the treaty.¹⁵⁴ However, this prohibition operates only as long as the treaty is in force. Article XVII specifically stipulates that, upon termination of the treaty, the use of water in the Columbia basin is to revert under article II of the 1909 convention which gives exclusive jurisdiction to the upstream riparian over its part of the transboundary streams.¹⁵⁵ Article II is to survive even after expiration of both the Columbia treaty and the boundary convention itself, unless separately denounced. However, both countries are empowered to denounce the article's application to the Columbia River upon a year's notice, even prior to the termination of the Columbia River Treaty, if Canada undertakes any work relating to unauthorized diversion. Upon termination of article II, principles of general international law are to apply. In relying on international law to safeguard its interests in the case of unauthorized diversions, the United States seems to have abandoned the Harmon doctrine as the correct expression of the present state of that law.

The implementation of the treaty is entrusted to operating entities designated by Canada and the United States.¹⁵⁶ They may be joint or separate bodies. The task of ensuring that the objectives set by the treaty are met is given to the Permanent Engineering Board which makes periodic inspections, may require reports from the operating entities, and assists in reconciling their differences concerning technical matters. It also assembles records of the flow of the Columbia and Kootenay Rivers at the boundary and reports on operations under the treaty.¹⁵⁷ The Board seems to be a supervisory and coordinating body with rather restricted powers. The International Joint Commission is entrusted with only one function, that of operating as an arbitration tribunal if so requested by one party.¹⁵⁸ To assume a similar function under the treaty of 1909, the Commission had to be requested by both parties.

152. Art. III, 44 Dep't State Bull. 235 (1961).

153. Art. XII, 44 Dep't State Bull. 237 (1961).

154. Art. XIII, 44 Dep't State Bull. 237 (1961).

155. 44 Dep't State Bull. 239 (1961).

156. Art. XIV, 44 Dep't State Bull. 238 (1961).

157. Art. XV, 44 Dep't State Bull. 238 (1961).

158. Art. XVI, 44 Dep't State Bull. 239 (1961).

The treaty can be terminated by either party on ten years' notice after it has been in force for sixty years.¹⁵⁹ However, certain rights acquired under the treaty are preserved, such as the United States' title under article XII to the Canadian lands necessary for the Libby dam project until the end of the useful life of the dam; or the right of the United States to receive flood control service under article IV until the end of the useful life of the Canadian facilities (or until the conditions that cause flooding cease to exist).¹⁶⁰

Two annexes are attached to the treaty. Annex A contains principles of operation for flood control and power, and Annex B sets up in detail the method for determining downstream power benefits. The treaty does not deal with navigation. It was ratified by the United States, but Canadian ratification has been delayed due to differences between the federal and British Columbia governments.¹⁶¹

IV. TREATIES WITH NONRIPARIANS

United States treaties with nonriparians concerning rivers can be divided into two categories: commerce and navigation conventions, which deal on a reciprocal basis with navigation in general, and treaties pertaining to particular rivers outside the United States.

A. *Commerce and Navigation Conventions*

The commerce and navigation treaties as a rule reserve inland navigation, along with coastal trade and fisheries, for national boats.¹⁶² Sometimes, however, a stipulation is added that inland navigation may be permitted on a basis of reciprocity,¹⁶³ or that it may be accorded most-

159. Art. XIX, 44 Dep't State Bull. 240 (1961).

160. *Ibid.*

161. The gist of the dispute lies in the determination by the provincial government of British Columbia to sell back to the United States power produced in the United States with the help of Canadian facilities and handed over to Canada on the strength of the theory of downstream benefit embodied in the treaty. This is opposed by the Canadian federal government whose established policy is not to export hydroelectric power, since it would be difficult to recapture it later to satisfy new needs. See Cohen, *The Columbia River Treaty—A Comment*, 8 McGill L.J. 212 (1962). The question as to whether the development of power on international rivers in pursuance of a treaty belongs to the jurisdiction of the Canadian province concerned or to that of the federal government has a long history and has not been definitely settled. See *Re Water Powers' Reference*, [1929] Can. Sup. Ct. 200, [1929] 2 D.L.R. 481 (1929). If the former, then the province's objections to the implementation of the treaty would cause long and uncertain litigation, hence delay in the ratification of the treaty. On the subject of implementation of Canadian treaties, see Szablowski, *Creation and Implementation of Treaties in Canada*, 34 Can. B. Rev. 28 (1956).

162. E.g., Treaty of Friendship, Commerce and Navigation with Greece, Aug. 3, 1951, art. XXI, [1954] 2 U.S.T. & O.I.A. 1889, T.I.A.S. No. 3057.

163. Treaty of Friendship, Commerce and Navigation with the Italian Republic, Feb. 2, 1948, art. XXII, 63 Stat. 2286, T.I.A.S. No. 1965.

favored-nation treatment.¹⁶⁴

Some earlier treaties of this kind did not explicitly exclude inland navigation¹⁶⁵ and such exclusion could be inferred only from the formula that vessels of either party could come to "ports, places, and rivers . . . wherever foreign commerce is permitted."¹⁶⁶ The treaties with Ecuador of 1839¹⁶⁷ and with Guatemala of 1849¹⁶⁸ do not contain this formula at all and lend themselves to the interpretation that navigation on the rivers of both parties is permitted.

The Jay Treaty of 1794¹⁶⁹ expressly permitted navigation on United States rivers and in this respect constitutes an exception. It stipulated that:

There shall be between all the dominions of his Majesty in Europe and the territories of the United States, a reciprocal and perfect liberty of commerce and navigation. The people and inhabitants of the two countries respectively, shall have liberty freely and securely, and without hindrance and molestation, to come with their ships and cargoes to the lands, countries, cities, ports, places and rivers, within the dominions and territories aforesaid. . . .¹⁷⁰

To sum up, it can be said that as a rule navigation on United States rivers is explicitly prohibited to nonriparians by treaty, not because it would otherwise be claimed as a right under international law, but in order that it might not be deduced from general provisions concerning navigation in the treaties of commerce and navigation. However, nonriparians are usually not concerned with navigation by small boats, but with reaching the farthest possible port on an international river that is open to commercial intercourse and accessible to seagoing ships.

B. Treaties Pertaining to Particular Rivers Outside the United States

In this category are represented both multilateral and bilateral agreements. By the first such multilateral agreement (an exchange of notes of November 5, 1945, between the United States and Allied governments concerned)¹⁷¹ the United States agreed to participate in the Central Commission for the Rhine. Next came the peace treaties of 1947 with

164. Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, Oct. 29, 1954, art. XX, [1956] 2 U.S.T. & O.I.A. 1860, T.I.A.S. No. 3593.

165. E.g., Treaty with Sweden and Norway, July 4, 1827, 8 Stat. 346, T.S. No. 348, 2 Malloy 1748.

166. Art. I, 8 Stat. 346, T.S. No. 348, 2 Malloy 1749.

167. Treaty with Ecuador, June 13, 1839, 8 Stat. 534, T.S. No. 76, 1 Malloy 421.

168. Convention of Peace, Amity, Commerce, and Navigation with the Republic of Guatemala, March 3, 1849, 10 Stat. 873, T.S. No. 149, 1 Malloy 861.

169. Nov. 19, 1794, 8 Stat. 116, T.S. No. 105, 1 Malloy 590.

170. Art. XIV, 8 Stat. 124, T.S. No. 105, 1 Malloy 600.

171. 60 Stat. 1934, T.I.A.S. No. 1571.

Rumania,¹⁷² Hungary¹⁷³ and Bulgaria,¹⁷⁴ which contain provisions regarding freedom of navigation for all flags on the Danube. In 1948 the United States took part in the Belgrade Conference regarding that river, but did not sign the resulting convention, due to differences with the Soviet Union as to the meaning of the principle of freedom of navigation for all flags and membership of the Danube Commission.¹⁷⁵

The United States had previously concluded bilateral treaties in which freedom of navigation of some South American rivers was proclaimed. In 1853, a treaty devoted to freedom of navigation on the Paraná and Uruguay Rivers was entered into with the Argentine Republic.¹⁷⁶ Those rivers were to be free both in peace and in war for the navigation of merchant vessels of all nations "excepting in what may relate to munitions of war, such as arms of all kinds, gunpowder, lead, and cannon balls."¹⁷⁷ A similar principle was established for the Amazon and La Plata Rivers in the Treaty of Peace, Friendship, Commerce, and Navigation of 1858 with Bolivia,¹⁷⁸ except that freedom of navigation during war was not mentioned. A year later, in the Treaty of Friendship, Commerce, and Navigation with the Republic of Paraguay, signed on February 4, 1859, the United States obtained the right of navigation on the Paraguay River but only for its own vessels.¹⁷⁹ The United States' interest in rivers outside its own continent, sporadic in the past, increased after World War II, as is shown by participation in or efforts to participate in multilateral treaties.

V. SETTLEMENT OF DISPUTES

Only two treaties with Great Britain and Canada have provisions concerning the settlement of disputes. The 1909 Boundary Waters Treaty stipulated that:

Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants,

172. Treaty of Peace with Roumania, Feb. 10, 1947, art. 36, 61 Stat. 1818, T.I.A.S. No. 1649, 42 U.N.T.S. 70.

173. Treaty of Peace with Hungary, Feb. 10, 1947, art. 38, 61 Stat. 2130, T.I.A.S. No. 1651, 41 U.N.T.S. 208.

174. Treaty of Peace with Bulgaria, Feb. 10, 1947, art. 34, 61 Stat. 1970, T.I.A.S. No. 1650, 41 U.N.T.S. 82.

175. See 19 Dep't State Bull. 197 & 219 (1948).

176. Treaty with the Argentine Confederation, July 10, 1853, 10 Stat. 1001, T.S. No. 3, 1 Malloy 18.

177. Art. VI, 10 Stat. 1003, T.S. No. 3, 1 Malloy 19.

178. May 13, 1858, art. XXVI, 12 Stat. 1016, T.S. No. 32, 1 Malloy 122.

179. 12 Stat. 1091, T.S. No. 272, 2 Malloy 1364.

may be referred for decision to the International Joint Commission by the consent of the two Parties. . . .¹⁸⁰

If the Commission fails to reach a decision by majority vote, the dispute is to be referred to an umpire who has the power to render a final ruling. The Columbia River Treaty of 1961 goes further.¹⁸¹ Here consent is not necessary. Either of the parties can refer differences arising out of the treaty to the International Joint Commission for decision. If the Commission does not render a decision within three months then either party may by written notice to the other submit the difference to arbitration.

Three treaties with Mexico also mention settlement of disputes. The 1848 treaty stipulated that no violent measure shall be undertaken until the aggrieved party

shall have maturely considered, in the spirit of peace and good neighborhood, whether it would not be better that such difference should be settled by . . . arbitration. . . . And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case.¹⁸²

This clause was incorporated by reference in the treaty of 1853.¹⁸³ The treaty of 1944 contains a provision which empowers the Commission to settle differences between the two countries; however, this settlement has to be approved by both governments.¹⁸⁴ Moreover, since 1929, when both countries became parties to the Inter-American Arbitration Treaty,¹⁸⁵ they have been obliged to submit to compulsory arbitration all disputes that are juridical in nature.

The earlier treaties of commerce and navigation as a rule did not have arbitration provisions,¹⁸⁶ whereas the modern ones as a rule do have them.¹⁸⁷ Finally, acceptance by both parties of the compulsory jurisdiction of the International Court of Justice serves as a catchall provision for the settlement of disputes arising under water treaties. But

180. Treaty with Great Britain, Jan. 11, 1909, art. X, 36 Stat. 2453, T.S. No. 548.

181. Treaty with Canada Relating to the Columbia River Basin, Jan. 17, 1961, art. XVI, 44 Dep't State Bull. 239 (1961).

182. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, art. XXI, 9 Stat. 938, T.S. No. 207, 1 Malloy 1117.

183. Treaty with Mexico, Dec. 30, 1853, 10 Stat. 1031, T.S. No. 208, 1 Malloy 1121.

184. Treaty with Mexico Respecting Water Utilization, Feb. 3, 1944, art. 24(d), 59 Stat. 1256, T.S. No. 994.

185. Jan. 5, 1929, 49 Stat. 3153, T.S. No. 886.

186. E.g., Treaty of Commerce and Navigation with Belgium, March 8, 1875, 19 Stat. 628, T.S. No. 28, 1 Malloy 90; Convention with the French Republic, Sept. 30, 1800, 8 Stat. 178, T.S. No. 85, 1 Malloy 496.

187. E.g., Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, Oct. 29, 1954, [1956] 2 U.S.T. & O.I.A. 1839, T.I.A.S. No. 3593.

this general provision is reduced almost to a formula requiring in each case the mutual consent of both parties, because under the Connally Amendment the United States excludes all disputes which it regards as falling within its domestic jurisdiction.¹⁸⁸

VI. TERMINATION OF TREATIES

The commerce and navigation treaties are usually concluded for a number of years, with the provision that after the initial period they can be terminated by notice of either party.¹⁸⁹ The United States availed itself of this right in 1866, when it terminated the reciprocity treaty of 1854.

Though entitled "Treaty of Amity, Commerce and Navigation," the Jay Treaty of 1794 deals in the first part with the aftermath of the Revolutionary War and only in the second part with matters pertaining to commerce and navigation. For this reason, it stipulated that the first ten articles were to be permanent, whereas all the subsequent ones were to terminate after twelve years.¹⁹⁰ Provisions concerning river navigation were included in the first ten articles as part of the boundary problems, whereas freedom of overseas navigation was placed in the second section, as pertaining to commerce and navigation proper.

The Webster-Ashburton Treaty of 1842,¹⁹¹ which deals with several matters, such as boundaries, extradition, slave trade and river navigation, has a different timetable for each. According to article XI, provisions concerning suppression of slave trade were to be in force for five years and afterward can be ended by either party; those concerning extradition can be terminated at any time; and boundary settlement and navigation arrangements are to last indefinitely.¹⁹²

The 1871 Treaty of Washington permits navigation on the St. Lawrence River for an indefinite period,¹⁹³ but limits that on Lake Michigan to ten years.¹⁹⁴ The 1846 boundary convention,¹⁹⁵ dealing incidentally with the navigation of the Columbia River, and the peace treaties of 1783 with Great Britain,¹⁹⁶ concerning freedom of navigation on the

188. See [1959-1960] I.C.J.Y.B. 256.

189. E.g., Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, Oct. 29, 1954, [1956] 2 U.S.T. & O.I.A. 1839, T.I.A.S. No. 3593.

190. Nov. 19, 1794, art. XXVIII, 8 Stat. 129, T.S. No. 105, 1 Malloy 605.

191. Treaty with Great Britain, Aug. 9, 1842, 8 Stat. 572, T.S. No. 119, 1 Malloy 650.

192. 8 Stat. 577, T.S. No. 119, 1 Malloy 656.

193. Treaty with Great Britain, May 8, 1871, art. XXVI, 17 Stat. 872, T.S. No. 133, 1 Malloy 711.

194. Art. XXXIII, 17 Stat. 874, T.S. No. 133, 1 Malloy 713.

195. Treaty with Great Britain, June 15, 1846, 9 Stat. 869, T.S. No. 120, 1 Malloy 656.

196. Definitive Treaty of Peace with Great Britain, Sept. 3, 1783, 8 Stat. 80, T.S. No. 104, 1 Malloy 586.

Mississippi, and of 1848 with Mexico,¹⁹⁷ have no termination provisions. As far as agreements wholly devoted to rivers are concerned, the treaties of 1906¹⁹⁸ and 1944¹⁹⁹ with Mexico have no termination provisions; the 1909 Boundary Waters Convention with Canada, on the other hand, was concluded for five years and thereafter can be terminated on twelve months' notice by either party.²⁰⁰

The Columbia River Treaty of 1961, also with Canada, is to last for sixty years or longer, if not terminated on ten years' notice by either party.²⁰¹ Certain provisions concerning dams and storage facilities are to remain in operation even if the treaty is terminated, until the end of the useful life of those works.²⁰²

On the whole, the treaties or provisions of treaties concerning United States rivers were concluded either for indefinite or for long periods of time.

A. *Influence of War*

The earlier writers took it for granted that war terminates all treaties between enemies.²⁰³ However, as the treaties became more complicated and their subject matter more varied, this extreme view was changed and now, according to the most commonly held opinion, war abrogates some treaties, suspends some, and leaves others unaffected.²⁰⁴ It has been shown that multilateral treaties concerning European rivers belong to the category that is not abrogated by war.²⁰⁵ On the North American continent the only river provisions so affected, those included in the treaties of 1783 and 1794, were claimed to have been abrogated by the War of 1812.²⁰⁶ But, because opinion concerning the effect of war on treaties has changed since 1812, the fate of those early navigation provisions cannot be held as a precedent. On the other hand, a hasty analogy with European treaties may also lead to unwarranted conclusions, because the important European river treaties are multilateral, whereas those in North America are all bilateral. As to the bilateral treaties, the most that can safely be said is that the emerging practice of states leaves

197. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922, T.S. No. 207, 1 Malloy 1107.

198. Convention with Mexico, May 21, 1906, 34 Stat. 2953, T.S. No. 455, 1 Malloy 1202.

199. Treaty with Mexico, Feb. 3, 1944, 59 Stat. 1219, T.S. No. 994.

200. Treaty with Great Britain, Jan. 11, 1909, 36 Stat. 2448, T.S. No. 548.

201. Treaty with Canada Relating to the Columbia River Basin, Jan. 17, 1961, art. XIX, 44 Dep't State Bull. 240 (1961).

202. *Ibid.*

203. See De Vattel, *Law of Nations* § 175, at 371 (transl. from the new ed. 1861).

204. See Tobin, *The Termination of Multipartite Treaties* 23 (1933).

205. *Id.* at 161-72.

206. 1 Malloy 580 note a.

it to the peace treaty or other postwar arrangement to decide which treaties are to survive and which to succumb.²⁰⁷

B. *Problem of Succession*

The problem of succession of a new state to the treaties of the parent state is one of the most complex in international law. When new states emerged in Eastern Europe as a consequence of World War I, it was held that they were not responsible for obligations concerning river navigation undertaken by the states of which they had previously formed part.²⁰⁸ There is hardly any precedent in this respect for United States rivers. The only treaty concluded before United States independence which contained provisions regarding North American rivers was the peace treaty of 1763 whereby France and Great Britain agreed that the Mississippi would be open to the navigation of their subjects.²⁰⁹ After the United States became an independent nation, President Jefferson used the river provisions of this treaty as one of his arguments to demonstrate to Spain, which then held both banks of the lower Mississippi, that United States citizens had the right to navigate that river.²¹⁰ It is not certain, however, whether he considered the relevant provisions of the treaty of 1763 to be still in force between the United States and Spain. Moreover, it is doubtful if they survived first the cession of Louisiana by France to Spain and second, the War of American Independence in which Spain took part against Great Britain (1779-1782). In any case, the treaty of 1795 with Spain makes no reference to any earlier treaties and opens the Mississippi to United States citizens as a grant from the Spanish king.²¹¹

Both Mexico and Canada gained independence later than the United States. However, in Mexico's case there were no river treaties to inherit, and in Canada's case the transition was smooth and orderly, extended over several years, and therefore presented few problems in succession to the treaties.

VII. COMPARISONS WITH THE EUROPEAN FLUVIAL SYSTEM

The difference between the American and European fluvial systems was stated by Professor Alvarez at the Barcelona Convention as follows:

207. Treaty of Peace with Italy, Feb. 10, 1947, 61 Stat. 1245, T.I.A.S. No. 1648.

208. See Winiarski, *Rzeki Polskie ze Stanowiska Prawa Miedzynarodowego* 146 (1922); see also 2 Hyde, *International Law* § 545, at 1541 (2d rev. ed. 1945); McNair, *The Law of Treaties* 453-54 (1938).

209. 15 *Recueil des Traités de la France* 70.

210. See 1 Moore § 130, at 624.

211. Treaty of Friendship, Limits and Navigation with Spain, Oct. 27, 1795, 8 Stat. 138, T.S. No. 325, 2 Malloy 1640.

In Europe the principle of free navigation on its rivers is almost absolute, and is, moreover, usually enunciated in the conventions concluded between Great Powers. As regards the regime to which free navigation is subject, recourse has sometimes been made, in determining it, to commissions which even include delegates from non-riparian states. In the New World the question is governed by a number of conventions between riparian states and also by certain provisions of those states. Thus it cannot be said that the principle of free navigation is in the position of recognized principle there; moreover, the system of administrative commissions is unknown.²¹²

But perhaps this comparison is too optimistic insofar as the European fluvial system is concerned. In Europe freedom of navigation is based also on conventions, and freedom for all flags is by no means universally accepted. Furthermore, only one commission with nonriparian membership exists at present. As far as uses other than navigation are concerned, the parallel in development is even closer; the state of customary international law on both continents in this respect is still controversial, whereas conventional law stresses the common rights and interests of riparian states. The trend in fluvial law on both continents can, then, be summed up as a slow and often discontinuous progress toward the concept of shareability of water resources.

VIII. CONCLUSION

The United States river treaties show certain salient features, namely, emphasis on navigation and power in the North, and on irrigation, with power again second, in the South; restricted definition of boundary waters; freedom of navigation of United States rivers limited to riparians only, except that, according to stipulations in some commerce and navigation treaties, such navigation could be opened to nonriparians on the basis of a most-favored-nation clause; effective use of international commissions; and finally, adherence to the concept of the preferred situation of the upper riparian.

Perhaps the most negative characteristic of this system is the restrictive definition of frontier rivers. If transboundary waters were included in the definition of boundary waters and if all the rights that now pertain under the 1909 Boundary Waters Treaty to boundary waters were conferred on them, this would not only eliminate the antiquated notion of the preferred situation of the upper riparian insofar as the use of water is concerned, but would probably also speed up acceptance of the concept of the integrated river basin.

212. Report of Alejandro Alvarez at the Barcelona Conference of 1921, quoted in 1 Hyde, *International Law* § 167, at 534 (2d rev. ed. 1945).